

148 FERC ¶ 61,001
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Midcontinent Independent System Operator, Inc.

Docket No. ER14-1872-000

ORDER ON ENGINEERING DESIGN AND PROCUREMENT AGREEMENT

(Issued July 1, 2014)

1. On May 2, 2014, Midcontinent Independent System Operator, Inc. (MISO) filed, under section 205 of the Federal Power Act (FPA),¹ a Letter Agreement for Engineering Design and Procurement of Material for a Portion of the Required Network Upgrades (E&P Agreement) between Michigan Electric Transmission Company, LLC (Michigan Electric), and New Covert Generating Company, LLC (New Covert) (together, Parties) (May 2 Filing). In this order, we accept MISO's May 2 Filing, and we give notice pursuant to section 388.112(d) of the Commission's regulations that the Commission is considering the release of information contained in the filing for which MISO claims privileged status and that MISO has 30 days from the date of this order to file written comments to show cause why the information should not be made public, as explained below.²

I. Background

2. The E&P Agreement states that New Covert intends to disconnect its existing generating facility in Van Buren County, Michigan, from Michigan Electric's transmission system, operated by MISO, and to interconnect the facility to ITC Interconnection LLC's (ITC Interconnection) transmission system, operated by PJM Interconnection, L.L.C. (PJM). The E&P Agreement explains that the Parties expect to execute a Facilities Construction Agreement (FCA) to provide for network upgrades to Michigan Electric's transmission system after MISO completes a System and Facilities

¹ 16 U.S.C. 824d (2012).

² 18 C.F.R. § 388.112(d) (2013).

Impact Study (SIS) of New Covert's planned interconnection to the ITC Interconnection transmission system; the projected in-service date for these network upgrades is September 30, 2015. The E&P Agreement also states that New Covert will enter into negotiations with ITC Interconnection towards a Generator Interconnection Agreement (GIA) with PJM as a party.³

3. MISO states that the purpose of the E&P Agreement is to expedite the design phase of the network upgrades during completion of the SIS and finalization of the FCA. The E&P Agreement provides that, upon Michigan Electric's receipt of an irrevocable, standby letter of credit (Letter of Credit) from New Covert, Michigan Electric will design, engineer, and procure any equipment, property, right-of-way or easements that are required to modify its transmission facilities to support the September 30, 2015 in-service date. MISO states that New Covert agrees to pay all of Michigan Electric's actual costs incurred prior to execution of the anticipated FCA.⁴

4. Exhibit A of the E&P Agreement presents a line diagram of the proposed network upgrades. Exhibit A is designated as Critical Energy Infrastructure Information, pursuant to section 388.113(c)(1) of the Commission's regulations.⁵ MISO states that the Parties assert that Exhibit A displays information that relates details about the production, generating, transportation, transmission, or distribution of energy.

5. The nonpublic version of the E&P Agreement also states dollar amounts of cost estimates for each task of the work and the total amount of the Letter of Credit (Cost Information), which are withheld and labeled as "privileged" in the public version of the E&P Agreement. MISO states that the Parties assert that the Cost Information qualifies as privileged because it is confidential, financial information directly relating to New Covert's construction costs, which, if disclosed, could cause substantial harm to the company's competitive position. MISO contends that the Cost Information is exempt from mandatory disclosure under Exemption No. 4 of the Freedom of Information Act (FOIA), which applies to trade secrets and other confidential business information.⁶ MISO also states that the Commission has recognized the confidentiality of such

³ MISO May 2 Filing, Transmittal at 1-2; May 2 Filing, E&P Agreement at 1-3.

⁴ May 2 Filing, E&P Agreement at 3-4.

⁵ 18 C.F.R. § 388.113(c)(1) (2013).

⁶ 5 U.S.C. § 552 (2012).

information in previous MISO filings.⁷ MISO further states that MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) also recognizes that this information, prior to the signing of a GIA, is treated as confidential information.⁸

6. MISO asks the Commission to grant waiver of the Commission's 60-day prior notice requirement, as required by section 35.3(a) of the Commission's regulations,⁹ and to make the E&P Agreement effective as of May 3, 2014.

II. Notice and Responsive Filing

7. Notice of MISO's May 2 Filing was published in the *Federal Register*, 79 Fed. Reg. 27,293 (2014), with interventions and protests due on or before May 23, 2014. Consumers Energy Co. (Consumers Energy) filed a motion to intervene and protest.

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), Consumers Energy's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Consumers Energy's Protest

9. Consumers Energy states that it is a transmission-dependent utility and is Michigan Electric's largest customer. Consumers Energy states that two timing gaps could occur prior to the anticipated September 30, 2015 in-service date for the network upgrades on the Michigan Electric transmission system; one gap could occur should New Covert disconnect from Michigan Electric prior to that date and the other should New Covert interconnect to the PJM transmission system before the proposed network upgrades are in place. Consumers Energy is concerned about the treatment of costs that may be incurred as a result of these potential gaps. It states that the area of New Covert's

⁷ May 2 Filing, Transmittal at 3 & nn.6-7 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-839-000 (Apr. 12, 2010) (delegated letter order); *Midwest Indep. Transmission Sys. Operator, Inc.*, Docket No. ER10-1098-000 (June 24, 2010) (delegated letter order)).

⁸ *Id.* at 3 & n.5 (citing MISO, FERC Electric Tariff, 4, Attachments, Attachment X, Generator Interconnection Procedures (GIP), section 13.1).

⁹ 18 C.F.R. § 35.3(a) (2013).

generating facility has been subject to unusually high congestion costs in recent months and that these congestion costs are likely to be exacerbated by New Covert's move to PJM. Consumers Energy urges that Michigan Electric's customers not be exposed to any resultant increased congestion costs.¹⁰

10. Consumers Energy cites section 38.2.7 of MISO's Tariff, which requires a market participant to submit a notice pursuant to Attachment Y of the Tariff (Attachment Y Notice) if it plans to disconnect a resource from the MISO transmission system for longer than two months.¹¹ Consumers Energy claims that New Covert should have filed an Attachment Y Notice with MISO so that MISO would then study whether congestion would be caused or reliability impacted during the period between New Covert's disconnection from Michigan Electric and the completion of the network upgrades. Consumers Energy also notes that MISO could require New Covert to enter into a System Support Resource (SSR) agreement for this time period if necessary. Consumers Energy observes that the May 2 Filing does not refer to an Attachment Y Notice by New Covert or an SSR agreement.¹²

11. Consumers Energy asks the Commission to require MISO to explain why the Attachment Y process was not followed in this situation and how it will address congestion and reliability impacts during the time period between the disconnection of New Covert's generating facility from Michigan Electric's transmission system and completion of the network upgrades.¹³

IV. Commission Determination

12. We find that the May 2 Filing appears to be just and reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept the E&P Agreement for filing, to become effective on May 3, 2014, as requested, for good cause shown. We find Consumers Energy's arguments regarding timing gaps that could occur prior to the anticipated September 30, 2015 in-service date for the network upgrades, the potential for increased congestion costs associated with New Covert's move to PJM, and whether an

¹⁰ Consumers Energy Protest at 3-4.

¹¹ See MISO, FERC Electric Tariff, 4, Attachments, Attachment Y, Notification of Potential Resources/[Synchronous Condenser Unit] Change of Status (30.0.0).

¹² Consumers Energy Protest at 3-4.

¹³ *Id.* at 5.

Attachment Y Notice is required at this time,¹⁴ to be speculative and beyond the scope of this proceeding. We note that none of Consumers Energy's arguments challenge the justness and reasonableness of the E&P Agreement itself.

13. However, we give notice, pursuant to 18 C.F.R. § 388.112(d), that the Commission is considering the release of the Cost Information and that MISO has 30 days from the date of this order to respond with a more detailed written explanation than that provided with the filing, to articulate more completely why the Cost Information therein should not be made public.

14. MISO contends that the Cost Information is exempt from mandatory disclosure under FOIA Exemption No. 4. FOIA Exemption No. 4 protects from public disclosure trade secrets and commercial or financial information that is privileged or confidential.¹⁵ A person requesting that material be treated as privileged information must include in its filing a complete and reasoned justification for such treatment.¹⁶ MISO states that New Covert's construction costs are financial information that, if disclosed, would cause substantial harm to the company's competitive position. However, MISO does not provide specific information in support of that claim.

15. MISO further states that its Tariff recognizes that this information, prior to the signing of a GIA, is treated as confidential information. We acknowledge that section 13.1 of Attachment X to MISO's Tariff states that "Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by any Party

¹⁴ We note that a market participant planning to retire or suspend a generation resource must notify MISO at least 26 weeks prior to taking such action. *See* MISO, FERC Electric Tariff, 2, Modules, Module C, Energy and Operating Reserve Markets, II, General Provisions, 38.2. Market Participants, 38.2.7, System Support Resources, section 38.2.7.a (4.0.0) ("A Market Participant shall complete and deliver to the Transmission Provider an Attachment Y Notice at least twenty-six (26) weeks prior to Retiring or Suspending all or a portion of a Generation Resource or a [Synchronous Condenser Unit] that it either owns or operates. . . .").

¹⁵ 5 U.S.C. § 552(b)(4) (2012); *see also* 18 C.F.R. § 388.107(d) (2013).

¹⁶ 18 C.F.R. § 388.112(b)(1) (2013); *see also* *Algonquin Gas Transmission, LLC*, 130 FERC ¶ 61,011, at P 48 (2010).

to another Party prior to the execution of a GIA.”¹⁷ However, section 13.1.1 of Attachment X excludes from that definition information that is “required . . . to be disclosed by any Governmental Authority or is otherwise required to be disclosed by law[.]”¹⁸ Therefore, MISO’s Attachment X by itself does not provide sufficient basis for a claim that information is privileged and protected from disclosure under FOIA Exemption No. 4.

The Commission orders:

(A) MISO’s May 2 Filing is hereby accepted effective May 3, 2014, as discussed in the body of this order.

(B) MISO is hereby given notice that the Commission is considering the release of the cost information that MISO seeks to protect from disclosure and that MISO has 30 days from the date of this order to file written comments to show cause why the information should not be made public, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ MISO, FERC Electric Tariff, 4, Attachments, Attachment X, Generator Interconnection Procedures (GIP) (32.0.0), section 13.1; *see also* FERC Stats. & Regs. ¶ 31,146, Appendix C, at 41 (2003).

¹⁸ MISO, FERC Electric Tariff, 4, Attachments, Attachment X, Generator Interconnection Procedures (GIP) (32.0.0), section 13.1.1.